"ANTITRUST IN 1954"

ADDRESS

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ANTITRUST IN 1954

A year ago I discussed with you the theories and practices of antitrust enforcement, and mentioned certain of our problems and the way in which we sought to solve them in connection with investigations, the institution of cases, informal conference procedures, and the disposition of cases.

Today I would like to review with you what has happened during the last year insofar as the carrying out of our obligation to enforce the antitrust laws is concerned. We have brought 35 new cases. Twelve of these were criminal cases. Of these 12, eight cases were indictments or informations charging price-fixing or other types of clear-cut Sherman Act violations, involving various commodities ranging from bottled gas, office supplies, brewers' corn goods, and lead pencils to bids for electrical installations. (Owyhee Bottle Gas Service, S. Barker's Sons Co., Charles A. Krause Milling Co., American Lead Pencil Co., and National Electrical Contractors Assn.). The remaining four criminal cases filed last year were all criminal contempts, brought against the Milk Wagon Drivers' Union in Chicago, the Associated Credit Bureaus in St. Louis, The American Can Co. in San Francisco, and J. Myer Schine and others in Buffalo.

Of the 12 criminal cases filed last year, six were also terminated last year. In three cases, nolo pleas were accepted (American

Lead Pencil Co., Owyhee Bottle Gas, and Inland Coca-Cola). In two cases, the defendants pleaded guilty to the charges (Charles A. Krause Milling Co., and Embroidery Cutters Assn.). The contempt proceedings against the American Can Company were dismissed by the Court. The other six criminal proceedings initiated last year are still pending; the trial of the contempt charges in the Schine case began early in December and is still going on, while the other cases should reach trial shortly.

In addition to the six criminal cases which were both filed and terminated last year, we also terminated 11 other criminal cases that had been initiated prior to 1954. Eight of these 11 cases were terminated by pleas of nolo contendere, one by a plea of guilty, and the Bowman Dairy case in Chicago was dismissed by the Government in view of the Supreme Court's decision in a related civil case. At this time I believe I should call your attention to one of these criminal cases. No longer can it be said, "No one in recent years has ever spent one day in jail as a result of a Sherman Act conviction." In the Las Vegas Merchant Plumbers case the defendants were found guilty by a jury, were sentenced to imprisonment by the court, the conviction was affirmed by the Court of Appeals, certiorari was denied by the Supreme Court, the trial court denied a motion for reduction of sentence, and the individual defendants are, at the present time, in jail,

serving six months' sentences. I do not report this to have you think any different or more stringent antitrust enforcement is being urged, but merely because I deem it proper to call to the attention of the antitrust bar the fact that this occurred.

Last year we also initiated 23 civil cases. Of these, seven were terminated with the virtually simultaneous entry of a consent decree. (American Lead Pencil Co., Cincinnati Milling Machines Co., Empro, Liberty National Life Insurance Co., Embroidery Cutters Assn., Pleaters, Stitchers & Embroiderers Assn., and Eastman Kodak Co.) I will have more to say a little later on with regard to the operation and effectiveness of this so-called pre-filing negotiation procedure. In addition, an eighth case we filed in 1954 was terminated by the entry of a consent judgment four months after the complaint was filed,[5/] as a result of pre-filing negotiations.

Besides the eight civil cases filed and terminated in 1954, 31 additional civil cases were closed. Five of these cases were closed during 1954 by litigated or partially litigated judgments. The case against United Shoe Machinery Corporation was terminated after the Supreme Court sustained the decree granted by the District Court giving relief against the practices of this defendant. The National Football League case was terminated by the entry of a decree after litigation granting substantial relief against the practices charged.

5/ Standard Ultramarine & Color Company, et al.

In the National Association of Leather Glove Manufacturers case, all but one defendant had previously negotiated a consent decree; the remaining defendant litigated the case and lost, the Court entering against it a judgment substantially similar to that consented to by the other defendants. An interesting footnote should be added in any reference to this case. The defendant appealed from the entry of the trial court's judgment to the Circuit Court of Appeals for the Second Circuit; without extended argument our motion to docket and dismiss the appeal was granted, in light of the clear statutory provisions giving the Supreme Court exclusive appellate jurisdiction in such cases. This case is further of interest to those who advise their clients that participation by overt acts is an essential ingredient to a conspiracy conviction; that mere knowledge plus passive receipt of business benefits is insufficient. A fourth civil case disposed of after litigation was the Investment Bankers case where the trial court dismissed the Government's complaint. The Chicago Mortgage Bankers case was also dismissed by the court after trial. The Armour case was dismissed on the Government's motion, in view of the pretrial rulings making it impossible for us to prove our case.

I have not referred to the duPont - General Motors case in Chicago, in which the trial court last month dismissed our complaint, because we do not count this case as terminated in view of our still existing right to appeal.

Twenty-four civil cases were disposed of during last year by the consent decree route. I do not think it profitable to attempt to evaluate or review any great number of these decrees for you. Without going into the details of a particular case, explaining the charges in the complaint and the facts as developed during negotiations of the decree, it is difficult to do more than generalize about the relief afforded by the decrees in these cases and the extent to which such relief promotes the enforcement of the antitrust laws. Time limitations require me to take only one or two cases and discuss them in more detail.

Before doing so, however, I would like to mention again our policy of pre-complaint negotiations, which was instituted during 1954 and applied to several large antitrust cases with measurable success. Under that policy, in cases which appear to us to be adapted to its use, the Division after it has investigated a particular situation and prepared a proposed complaint, notifies the prospective defendants of the intention of filing a civil complaint against them. In

general terms, we outline to the proposed defendants the nature and the grounds of our charges. If the prospective defendants care to start negotiations towards a possible decree in advance of the filing of our complaint, we are ready to meet them at the conference table, in an effort to work out a consent decree disposing of the questions raised by the complaint, keeping constantly in mind adequate safeguards for the public interest and, at the same time, the peculiar industry or company problems that plague the particular defendants. In all cases so far where we have suggested this procedure, save one, the prospective defendants have been quite ready to negotiate. Efforts to work out consent decrees prior to the time the complaint is filed have not been successful in all instances, but they have been successful in a sufficient number of the cases where we have followed this procedure to show that it offers substantial advantages, both to the defendants and to the Government.

From our standpoint, pre-filing negotiation has the advantage that it enables us to obtain relief, and thereby to promote or restore competitive situations or to remove obstacles to competitive forces, more rapidly than under other procedures. This is accomplished without the expense and delay attendant upon litigation. We achieve results which promote antitrust enforcement, with a saving of the

limited man hours and money available to us under our appropriation. The procedure is advantageous to defendants as it enables them to know where they stand and how they must operate their business in the future rapidly and without the costs and uncertainties of protracted litigation.

Pre-filing negotiation in itself is not a technique new to the Antitrust Division. In the second half of the 1920's, a large proportion of our cases - about a quarter of them - were handled by this procedure. In the 1930's however, this method of handling antitrust litigation fell into disuse. In 1939, it was revived after a fashion and continued to be employed through 1942. During this latter period, pre-filing negotiations were usually conducted after companion criminal cases had already been brought and were pending in court. The pre-filing negotiations of the civil case were, in reality, only a step in the settlement of the criminal prosecutions. The pressures of the pending criminal suit on the civil settlement negotiations, whether actual or inferred, was generally criticized by the antitrust bar.

Our current policy with respect to pre-filing consent judgment negotiations is very different from that policy which obtained from 1939 through 1942. Today's policy relates primarily to situations which are the subject of civil rather than criminal prosecution. In no instance is the sanction of the criminal law used to coerce the settlement of a civil case, and consent judgment negotiations are carried out entirely

separately from, and independently of, negotiations relating to correlated prospective criminal proceedings. The purpose of the new policy is to adjust civil antitrust controversies before they come to court, not to force the disposal, by criminal cases, of pending civil cases.

Almost exactly one year ago, the first consent judgment worked out pursuant to the Division's current policy on pre-filing settlement negotiations was entered in court. The case was United States v. American Lead Pencil Company, et al., an action which charged four principal lead pencil manufacturers with conspiracy to fix prices and allocate the sale of lead pencils, and to channel lead pencil sales through an agency system. You may be interested to learn how consent judgment negotiations in that case initially got under way before the case was filed in court.

In 1953, when I had been with the Antitrust Division for about six weeks, a conference was held in my office at the request of the pencil companies' counsel to discuss the investigation of their clients which the Division was then conducting. These counsel opened the conference on a note of candor, and they did not rely upon the conventional representations about the innocence of their clients. Indeed, at the outset they took practical, reasonable positions and submitted adequate and realistic settlement proposals, recognizing that our investigation had put in our possession a good deal of evidence which conversation would not overcome. Obviously, this situation, characterized as it was by good faith on both sides and by a common recognition of the facts, together with an informed and mutual realization of the significance of those

facts, presented an excellent opportunity to negotiate a judgment satisfactory to both parties.

There was one complicating factor present. The charges we proposed to make against the pencil company were of the type which normally are prosecuted on the criminal side. Because of the realistic and reasonable attitude adopted by counsel for the proposed defendants, were they entitled to be spared the criminal action? Was it possible to negotiate a civil judgment under these circumstances? I came to the difficult decision that we must file a companion criminal information along with the civil complaint against American Lead Pencil Company. The criminal information and the civil complaint were filed simultaneously; and nolo pleas were entered on the same day that the consent judgment was signed by the court. I do wish to emphasize, again however, that the criminal and civil aspects of this case were handled separately and independently. The criminal aspects of the matter very nearly prevented a settlement of the civil case, as I was and am extremely reluctant to engage in pre-filing negotiations where a related criminal prosecution is in prospect.

The Antitrust Division's experience with pre-filing negotiations in cases subsequent to the American Lead Pencil case has on the whole been a satisfactory one: both for defense counsel and for the government. Our recent case against Eastman Kodak Company illustrates well the successful operation of the pre-filing negotiation proceeding, and to my mind proves that with sincerity and good will many antitrust situations, even though they be fraught with difficult and complex problems, can be solved at the

conference table. This conference table solution moreover can, and I am convinced in this instance did, provide the Government with really effective relief, - as effective as any I can think of to restore real competition. It provided the defendants with a decree under which they can live and operate, and under which they can conduct their business reasonably and I assume profitably, and at the same time so change their business practices as to make them legal under the Sherman Act.

Let us examine this case in some detail and I think you will see why I make these statements. Following an investigation of a number of complaints regarding Eastman's monopoly of the processing of amateur color film, we prepared a proposed complaint attacking Eastman's monopoly of amateur color film processing and that company's practice of controlling the resale price of its color film through fair trade contracts. In our view, these resale price maintenance contracts were not protected by the Miller Tydings and McGuire Acts for a number of reasons. First, it was our position that the products were items of which Eastman had a monopoly, and hence were not products in free and open competition as required by these statutes. Second, the products were items which Eastman merchandised only on a basis which tied in the processing, and hence were not products in free and open competition. Third, the prices which Eastman had fixed included an unsegregated charge for service, that is, for processing, and the Miller Tydings and McGuire Acts relate only to commodities and do not provide any antitrust exception with reference to price-fixing agreements relating to services. Fourth, Eastman retailed the products in question

itself, through retail stores conducted by its own subsidiaries, and in direct competition with the independent retail dealers whose prices Eastman fixed by its fair trade contracts. The Miller Tydings and McGuire Acts declare, so the Department of Justice maintains, that the price-fixing exemptions provided thereby do not extend to agreements between retailers or to agreements between persons, firms or corporations in competition with one another. Although there seems to be a feeling in some quarters that Congress did not mean what it said in this connection, the Department has not yet subscribed to this view.

Our investigation convinced us that substantially all Kodachrome film (which is used in miniature still cameras to produce a transparency and in certain popular sizes of movie film) and Kodacolor film (which is used in the simpler types of cameras and produces a colored printed picture) sold in the United States was processed by Eastman after the film had been exposed. Our investigation also convinced us that the independent photo-finishers had no opportunity to process Eastman color film, and that the using public - amateur photographers throughout the country - were paying to Eastman, for its film processing, prices which were not determined by the force of competitive factors.

In July 1954, we notified Eastman officials of our intent to file our proposed complaint and furnished them with a copy of it. Eastman advised us that it wished to attempt to work out a consent decree in advance of the filing of the complaint. By August, substantial agreement had been reached with Eastman, as to the nature and scope of the consent

judgment. Subsequent negotiations, extending until early December, refined and implemented this agreement.

Our records indicate that, in all, 114 hours of negotiations were held in Washington with counsel for Eastman. This 114 hours does not, of course, include innumerable hours of staff conferences within the Department, telephone conversations with Eastman counsel, and necessary paper work by the staff in drafting language.

By mid-December these negotiations resulted in a decree which, in my opinion and that of my staff, will constitute an effective instrument to protect the public interest, and, at the same time, not create, for Eastman, impossible problems with which they could not live. This judgment was entered in the court at Buffalo on December 21, 1954, simultaneously with the filing of the complaint.

Thus, in less than six months, by means of the pre-complaint negotiations policy, a decree was entered, without the time and cost of a trial, which gave relief against a situation we thought violated the antitrust laws. This result was made possible by the intelligent and sincere cooperation of Eastman and its representatives, who were forthright and candid; and, appreciating our position, strove to work out a decree which would eliminate the trade restraints we charged and at the same time would be practical in the light of Eastman's operations and legitimate interests and aims. In my opinion, Eastman and its counsel demonstrated in this case a high order of integrity and a wholesome desire to conform to the law.

A word concerning the relief obtained in this case would be appropriate at this point. As indicated previously, our main targets were,

first Eastman's monopoly of the processing of its amateur color film, and second Eastman's control, through fair trade contracts, of the retail price of its film, including in that retail price an unsegregated charge for subsequent processing of the film. This unsegregated charge, in our opinion, was one of the keys to Eastmen's monopoly of processing because it completely foreclosed competitors from finishing Eastman's amateur color film.

The judgment entered in Buffalo requires Eastman to cancel its fair trade contracts relating to resale price maintenance of its amateur color film, and enjoins such contracts in the future. In addition, the judgment prohibits Eastman from selling its color film with a processing charge included in the sales price, and from tying together in any other way the sale and processing of its film. Of direct and immediate benefit to independent film processors are the requirements of the judgment that Eastman grant, upon request, licenses under its pertinent processing and materials patents, upon reasonable royalties; that Eastman make available technical manuals describing its color film processing technology; that the company send technically qualified person to plants of independent processors to supplement the technical information contained in the manuals, and that Eastman permit independent processors to send technical personnel to certain of its processing plants to observe the processing methods, processes, machines and equipment.

Given access to Eastman's processing and materials patents and technology, and the compulsory sale by Eastman of materials used in processing amateur color film, we feel that the independent processors

will have an opportunity to compete against Eastman in the processing of its color film, and that resultant benefits will accrue to amateur photographers.

The decree we negotiated in the Eastman case has been the subject of some favorable comment by those independent small businessmen who should be most benefited by it, namely, the photo-finishers and their customers. A recent issue of a drugstore trade publication carries a lead article captioned, "Big Rise in Drugstore Color Film Sales Seen as Result of New Eastman Policy - Agreement with Justice Department Ends Single Price for Film and Processing - Fair Trade Cancelled." The article which follows predicts that as a consequence of the Eastman judgment, drugstore business in color film will show a considerable increase inthe years ahead, compared with what it has been in previous years. In addition, it asserts that drugstores will tap a source of revenue almost entirely unknown in the drug field until now - a revenue derived from the addition of color film finishing tothe black and white film finishing, for which practically all drugstores today act as agents. According to the article, the reforms required by the judgment will lead to the increased use of color film for the average taker of snapshots who buys photographic supplies from a drugstore and has it handle the processing of his films.

Druggists will not be the only businessmen benefiting from the decree if the article in question is to be believed. According to the article, the executive secretary of the Master Photo Finishers Association has stated that within a year from 700 to a thousand of the

association members will be finishing color film in all sections of the United States. Today only 150 of the Association's 1400 members do any such work, and their operations in the color film processing field have been necessarily limited.

I want to refer to one other consent judgment entered in 1954. Tying agreements, as the Supreme Court has said, "serve hardly any purpose beyond the suppression of competition." In the case brought against the Investors Diversified Services, Inc., the charge was that the lender of money secured by a mortgage tied in the writing of hazard insurance on the mortgaged property. The consent judgment entered in that case ended the agreements which gave the mortgagee the exclusive right to place hazard insurance. The mortgagee, Investors Diversified Services, Inc., was required to tell borrowers of their right to select insurers of their own choice. However, Investors Diversified Services, Inc. could compete in the market, and could itself offer insurance - so long as it did not force and require borrowers to take the insurance from it in order to get the loan.

This consent decree has, we have reason to believe, had a widespread effect on the practices followed by many lenders, who were not technically bound by the Investors Diversified Services, Inc. decree. We hope the decree in this case has had a significant effect in enforcing the antitrust laws, by showing other lenders the dangers towards which these practices were leading. We are certain that, because of the interests of businessmen concerned with this matter, this decree has been widely publicised and has received a great deal of attention from persons in

this field of business - which we hope has promoted our objectives of antitrust enforcement.

There are other cases I could talk about, were they not pending. Among the major cases filed last year were the proceedings against Panagra, against United Fruit, and against RCA. Since none of these cases have progressed on the record beyond the initial stages, I cannot discuss them. Similarly, I do not care to go into details about the perfume cases which involve the interrelation of the trade-mark laws and the Sherman Act, or the Philco case which raises question of controlling resales.

In 1954, the Supreme Court handed down only the very brief per curiam in the United Shoe Machinery case affirming the district court's decree, and the companion opinions in the Chicago Plasterers and Lathers cases reversing the trial court's dismissals of these indictments on interstate commerce grounds. At present, Shubert and International Boxing have been argued and are awaiting decision, and the duPont cellophane case is before the court but will probably not be reached this term.

Before I close this cursory review of our 1954 struggles to enforce the antitrust laws within the given limits of our manpower and money, I want to allude to two other factors. One is the work of the Attorney General's Committee on the study of the antitrust laws. As you know, the Attorney General in 1953 set up a committee to study the antitrust laws, and their enforcement. He felt there should be established adequate legislation and interpretations of the antitrust laws to give clarity,

to produce uniformity, and to insure a common-sense approach to enforcement. The Committee is divided into two principal divisions - one dealing with substantive law and the other with procedural law. The membership is composed of lawyers and economists, chosen to secure the broadest approach to the question of what is best for the American economy, rather than what benefits may accrue to any particular industry or any specific business, or even a specific client.

The work of this Committee is not yet completed but its report, expected in a few weeks, should be of major significance in guiding future antitrust developments. May I here and now pay tribute to the high type of unselfish endeavor accomplished by this Committee. I have gained much in my association with it.